

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

**COMMENTS OF OUTDOOR CHANNEL, SPORTSMAN CHANNEL  
AND WORLD FISHING NETWORK**

KSE Media Ventures, LLC (“KSE”) owns and operates several media properties, including the following nationwide linear programming networks: Outdoor Channel, Sportsman Channel, and World Fishing Network. KSE submits these comments in response to the Notice of Proposed Rulemaking in this proceeding.<sup>1</sup> The findings of the FCC, based upon the extensive record developed in its Notice of Inquiry, are consistent with KSE’s real world experience with large multichannel video programming distributors (“MVPDs”). Several of those MVPDs have required unconditional (in whole or on important issues) most favored nation (“MFN”) provisions and unreasonable alternative distribution method (“ADM”) provisions in their distribution agreements with KSE’s networks. As the FCC has found, these provisions harm not only competition among programmers and distributors, but also programming diversity. They cannot be justified by the public interest, and the FCC should exercise its statutory authority to adopt rules prohibiting unconditional MFN and unreasonable ADM provisions.

The KSE programming networks provide a variety of sports programming of interest to the outdoors sports enthusiast, including, for example, hunting and fishing:

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<sup>1</sup> See *Promoting the Availability of Diverse and Independent Sources of Video Programming, Notice of Proposed Rulemaking*, 31 FCC Rcd. 11352 (2016) (“NPRM”).

- *Outdoor Channel* is the most widely-distributed programming network focused on the American outdoorsman, with a particular focus on outdoor adventure and conservation;
- *Sportsman Channel* is a nationally-distributed channel fully dedicated to the sportsman lifestyle, featuring programming on hunting and shooting; and
- *World Fishing Network* is a nationally-distributed channel dedicated to anglers and providing diverse and in-depth programming on fishing, boating, and the outdoor lifestyle.

See Exhibit A. There can be no question that these channels substantially contribute to programming diversity -- there is only one other full-time channel focused on programming for outdoor sports enthusiasts. KSE is not affiliated with an MVPD or a television broadcaster, and the KSE networks are independent programming networks.

#### **I. Restrictive MFN and ADM Provisions Constrain the Ability of Independent Programmers to Compete and Limit Distribution Through New Technologies**

Based upon its review of “thousands of comments from a broad range of interested parties” (NPRM at ¶5), the FCC recognized the “harmful effects” of restrictive MFN and ADM provisions on independent programmers, alternative distributors, and viewers:

The record from the NOI reveals that MVPDs have increasingly insisted that video programmers, particularly those that are small and independent, accept restrictive MFN and ADM provisions in order to secure carriage of their programming. The record also suggests that these types of provisions cause a variety of harmful effects. Consumers ultimately feel these negative effects most acutely. Because restrictive contract provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative, innovative platforms, they deprive consumers of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace. These benefits would include expanded choice in the sources and variety of video programming, technological innovation, greater flexibility in the means and manner of accessing program content, and lower prices for video programming services.

See NPRM at ¶2. KSE’s experience is consistent with, and reinforces, the FCC’s findings.

*A. MFN Provisions Imposed on Independent Programmers Are Anticompetitive*

In its comments in the NOI proceeding, KSE explained how large MVPDs have expanded the application and scope of MFNs over time, making them more onerous and anticompetitive for independent programmers.<sup>2</sup> The largest distributors have required increasingly complex and one-sided MFNs which are often unrelated to their contractually committed distribution. KSE provided a chart summarizing the changes in MFNs over time that have made them more onerous and restrictive, inhibiting the ability of independent programmers to compete fairly and effectively. *See* Exhibit B.

The impact of these types of restrictive, all-encompassing MFNs on the ability of independent programmers to compete for, and serve, new distribution outlets is apparent. For example, MFN provisions constrain the ability of independent programmers to provide their programming to new distribution technologies such as OTT platforms.<sup>3</sup> Unless the OTT distributor develops packages that generally mirror the packages of existing MVPDs, an independent programmer that is able to obtain packaging commitments from large MVPDs cannot agree to different or less-penetrated OTT distribution because it potentially will lose its existing packaging commitments. Likewise, initial free periods or rates may be unavailable to start-up OTT distributors because of their potential impact on the net effective rates of

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<sup>2</sup> As the Commission has recognized, the terms and conditions of affiliation or distribution agreements between programmers and distributors are highly confidential. *See Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, 29 FCC Rcd. 11864 (Med. Bur. 2014) (distribution agreements, “contain highly sensitive information that is central to the contracting parties’...business strategies, including, among other things, pricing and business terms”) at ¶13. Consequently, we cannot refer to specific contract provisions or language in agreements with particular distributors. These comments reflect our experiences in negotiations with multiple distributors over an extended period.

<sup>3</sup> This impact of MFNs on alternative distributors is consistent with the general observation that: “MFNs also can have exclusionary effects by raising the costs of rivals or entrants that attempt to compete by negotiating lower prices from suppliers of critical inputs, or by pioneering a different business model.” S. Salop and F. Morton, *Developing an Administrable MFN Enforcement Policy*, 27:2 Antitrust 15, 18 (2013) at 15.

established MVPDs, which may demand that such net effective rates be measured on a monthly or yearly basis.

Clearly, unconditional MFNs that give the benefit of contract provisions to large MVPDs without the corresponding obligations are unsupportable.<sup>4</sup> However, KSE respectfully submits that the burdensome web of MFN provisions summarized on Exhibit B effectively limits or precludes independent programmers from competitively providing their programming to alternative distributors, and more must be done to preserve and promote the programming diversity which independent programmers and alternative distributors provide.

No party in the NOI proceeding identified any “public interest benefits that accrue” from making MFN provisions unconditional. *See* NPRM at ¶20. The proposed MFN rules “are targeted only at contract clauses that harm competition, diversity and innovation while providing no apparent public interest benefits.” *Id.* at ¶15 n.67. MVPDs simply cannot justify the wide-ranging MFNs that they impose upon independent programmers.

*B. Unreasonable ADM Provisions Limit the Availability of Programming to Alternative Distributors*

Large MVPDs typically insist upon ADM provisions which limit an independent programmer’s ability to distribute its programming, including, in some cases, programming that has not been aired on its linear network, through new outlets, particularly over the Internet. Some MVPDs insist upon ADM provisions that preclude Internet distribution of programming, with or without a fee, for an extended period -- as much as 18 months, or even longer. This kind of ADM restriction, even if it is as short as 30 days, effectively precludes Internet distribution of a linear network. Other ADM provisions permit distribution of the

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<sup>4</sup> Large MVPDs often seek to preserve the appearance of conditionality while effectively eliminating it. They do so by excluding critical conditions such as carriage, penetration, and deletion from the conditions with which they must comply. The FCC must address these types of exclusions or distributors can avoid application of the FCC’s proposed rules by providing for limited conditionality on less important contractual issues.

independent programmer's linear service for a fee, which is subject to the distributor's MFN. However, even these provisions require the independent programmer to distribute its programming under the traditional MVPD model. With this type of ADM provision, the independent programmer cannot distribute specific network programming, directly to viewers or through other distributors, over the Internet during the restricted window.

The adverse effect of these kinds of ADM provisions on the ability of independent programmers to distribute their diverse programming through alternative distributors is obvious. The FCC could not identify any "discernibly pro-competitive justifications" for these kinds of ADM restrictions. *See* NPRM at ¶23. The FCC correctly characterized these provisions as "contract clauses that harm competition, diversity and innovation while providing no apparent public interest benefits." *Id.* at ¶15 n. 67.

## **II. The FCC Should Exercise Its Statutory Authority to Adopt the Proposed Rules to Preserve and Promote Programming Diversity.**

### *A. Programming Diversity Is in the Public Interest*

There can be no question that programming diversity is a "core public interest value." *See, e.g., Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign or Transfer of Control of Licenses and Authorizations*, 26 FCC Rcd 4238 (2011) at ¶27. There is "a deeply rooted preference for preserving and enhancing competition, accelerating private sector deployment of advanced services, [and] *promoting a diversity of information sources and services to the public.*" *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer of Control of Licenses and Authorizations*, 30 FCC Rcd. 9131 (2015) at ¶19 (emphasis added).

Consistent with its recognition of diversity as a "core public interest value," the FCC again acknowledged in the Notice of Inquiry that "[a] central objective of multichannel video

programming regulation is to foster a diverse, robust, and competitive marketplace for the delivery of multichannel video programming,” and that the FCC is “the agency charged by statute with implementing this objective.” *See Promoting the Availability of Diverse and Independent Programming, Notice of Inquiry*, 31 FCC Rcd. 1610 (2016) at ¶2. Several of the provisions of the Communications Act of 1934, as amended (“Act”), applicable to MVPDs and video programming expressly acknowledge programming diversity as one of the “purposes” of the Act.<sup>5</sup>

Further, the “Statement of Policy” in the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) declared that it was “the policy of Congress in this Act” to: (1) “promote the availability to the public of a diversity of views and information through cable television and other video distribution media;” (2) “ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;” and (3) “ensure that cable television operators do not have undue market power vis-à-vis video programming programmers and consumers.” *See Pub. L. 102-385, Sec. 2(b)*, 106 Stat. 1460, 1463. The 1992 Cable Act plainly identifies a diverse programming market as a statutory goal, and the FCC will advance that goal by implementing its MFN and ADM proposals.

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<sup>5</sup> *See* 47 U.S.C. §521(4) (“The purposes of this subchapter are to...(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public”); 47 U.S.C. §532(a) (“The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems”); 47 U.S.C. §533(f)(2) (“[T]he Commission shall, among other public interest objectives (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer; (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of video programming of such programmers to other video distributors...(G) not impose limitations which would impair the development of diverse and high quality video programming”).

*B. The Commission Has Statutory Authority to Adopt Rules Limiting MFN and ADM Provisions*

The FCC correctly concluded that Section 616(a) provides it with the necessary authority to adopt the regulations that it proposes. As explained below, Congress's direction in Section 616(a) that the FCC "shall establish regulations governing carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors" (47 U.S.C. §536(a)) constitutes a general grant of rulemaking authority to prohibit unconditional MFN provisions and unreasonable ADM clauses. *See* NPRM at ¶¶34-38. Section 625 provides alternative authority for the FCC to adopt its proposed rules.

1. Section 616(a)

Although Section 616(a) states that the program carriage regulations "shall" contain provisions regarding financial interests, exclusive rights and discrimination, it does not limit the FCC's regulatory authority regarding program carriage agreements to these three specific matters. Rather, Section 616(a) specifies only the minimum requirements for the regulations to be established by the FCC. The Second Report and Order adopted by the FCC in its 1992-93 program carriage rulemaking proceeding supports this interpretation. The FCC expressly recognized Section 616(a)'s broad intention to "prevent cable systems and other [MVPDs] from taking undue advantage of programming vendors *through various practices, including* coercing vendors to grant ownership interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems." *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order*, 9 FCC Rcd. 2642 (1993) (emphasis added), at ¶1. Thus, when the FCC first adopted the program carriage regulations, it acknowledged that Section 616(a) authorized the

FCC to address unspecified “various practices” through which MVPDs may disadvantage programming vendors, in addition to those listed in Section 616(a)(1)-(3).

The FCC again adopted an expansive view of the regulatory reach of Section 616(a) in its 2011 Notice of Proposed Rulemaking regarding the program carriage rules. *See Development of Competition and Diversity in Video Programming Distribution and Carriage; Notice of Proposed Rulemaking in MB Docket No. 11-131*, 26 FCC Rcd. 11494 (2011). In the 2011 proceeding, the FCC sought comment on a proposal to adopt a “new rule prohibiting an MVPD from taking an adverse carriage action against a programming vendor because the programming vendor availed itself of the program carriage rules.” *Id.* at ¶64. Although Section 616 does not expressly prohibit MVPDs from retaliating against programming vendors for filing program carriage complaints, the FCC stated that Section 616 “does not preclude the Commission from adopting additional requirements beyond [those] listed in the statute” and that it “believe[d]” that it had “authority to adopt a rule prohibiting retaliatory carriage practices.” *Id.* at ¶65. Thus, the FCC’s interpretation that it has authority under Section 616(a) to address unconditional MFN and unreasonable ADM provisions accords with the FCC’s long-held view of the scope of Section 616(a). In short, nothing in Section 616(a) limits the provision’s broad grant of authority to adopt regulations “governing carriage agreements and related practices.”

## 2. Section 628

Based upon the FCC’s prior interpretation of Section 628 of the Act, it also is clear that its program access provisions “serve as a valid basis for establishing rules to address restrictive



MFN and ADM provisions.” NPRM at ¶40.<sup>6</sup> In its First Report and Order adopting the program access regulations, the FCC plainly recognized that Section 628 affords the FCC “jurisdiction” to prohibit other practices that hamper the “broader distribution” of programming:

Thus, although the types of conduct more specifically referenced in the statute, i.e., exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable...programming.

*See Implementation of Sections 12 and 19 of the Cable Television and Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order*, 8 FCC Rcd. 3359 (1993), at ¶41. Thus, Section 628 specifies certain “minimum contents of regulations,” but also authorizes the FCC to address more broadly other “unfair practices” engaged in by cable operators or vertically integrated programmers that have “the purpose or effect” of significantly hindering or preventing “any [MVPD] from providing satellite cable programming or satellite cable broadcast programming to subscribers or consumers.”

The United States Court of Appeals for the D.C. Circuit adopted this interpretation of Section 628 in *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011). In reviewing the FCC order extending the program access rules to terrestrially-delivered programming, the

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<sup>6</sup> Section 628(b) of the Act prohibits a “cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest” from engaging in “unfair methods of competition or unfair and deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” *See* 47 U.S.C. §628(b). Section 628(c) requires the FCC to “prescribe regulations to specify particular conduct that is prohibited by” Section 628(b). *See* 47 U.S.C. §548(c). Section 628(c)(2), in turn, identifies specific prohibited “unfair practices,” such as the exercise of undue or improper influence, and discrimination in prices, terms or conditions of sale of satellite cable programming. However, like Section 616, the specifically-prohibited unfair practices merely set forth the “minimum contents” of the regulations to be adopted under the statute. 47 U.S.C. §548(c)(2).

D.C. Circuit cited “[S]ection 628’s broad language and purpose” and determined that Section 628 established a “floor rather than a ceiling” in the FCC’s authority to adopt regulations prohibiting anti-competitive conduct regarding the provision of programming. *Id.* at 699, 705. *See also National Cable & Telecom. Ass’n v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009) (D.C. Circuit upheld FCC regulation prohibiting exclusive cable operator/multiple dwelling unit contracts, noting that “Congress’s enumeration of specific, required regulations in subsection (c) actually suggests that Congress intended subsection (b)’s generic language to cover a broader field”). Section 628 therefore provides a “clear repository of Commission jurisdiction” to adopt the proposed MFN and ADM rules.

#### Conclusion

Unconditional MFN and unreasonable ADM provisions in MVPD distribution agreements plainly harm competition and programming diversity, and no party has identified a countervailing public interest benefit. The FCC should exercise its statutory authority and regulatory discretion to adopt rules prohibiting unreasonable MFN and ADM provisions.

Respectfully submitted,

KSE MEDIA VENTURES, LLC

/s/ David B. Gluck

David B. Gluck

Executive Vice President

January 26, 2017

## **Exhibit A**



# OUTDOOR SPORTSMAN GROUP



## OUTDOOR CHANNEL

Taking you across America and around the world on unparalleled adventures since 1993, Outdoor Channel is the first network dedicated to delivering a complete spectrum of real-life outdoor adventure entertainment. Outdoor Channel features programming with a broad-based appeal – including the highly-popular *Duck Dynasty*, our *Friday Night At The Movies* outdoor classics, and reality adventure series such as *Dropped: Escape The Arctic* and *Alaska's Ultimate Bush Pilots*.

» **40 million subscribers**



## SPORTSMAN CHANNEL

Devoted to honoring a lifestyle that is celebrated by millions of Americans, Sportsman Channel delivers informative and entertaining programming that showcases hunting and fishing and illustrates it through unique and authentic storytelling.

» **35 million subscribers**



## WORLD FISHING NETWORK

As the only 24/7 television network dedicated to fishing, World Fishing Network shares every angler's passion and adventure for fishing. WFN is the leading entertainment destination and resource for anglers throughout America, delivering diverse and engaging content to fishing and outdoor enthusiasts.

» **6 million subscribers**

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» **More than 134 million US Adults are outdoor enthusiasts who enjoy hunting, fishing or shooting – that's more than golf and tennis participation combined.**

*Source: Spring 2015 MRI weighted population, base = Adults 18+*

» **America boasts more than 32 million anglers. Nearly 14% of Americans have gone fishing in the past year, nearly doubling golf participation and four times more than tennis.**

*Source: 2015 MRI Doublebase, base = Adults 18+*

» **Outdoor Enthusiasts are 37% more likely to live in C or D counties and 60% more likely to live in a D county.**

*Source: 2015 MRI Doublebase, base = Adults 18+*

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## **Exhibit B**

### Today's MFN -- Overbroad and Anticompetitive

Type of MFN Clause	Earlier Provision	Current/More Restrictive Provision
Application of MFN	Size-Based -- The MFN applies only to those distributors with an equal or lesser number of subscribers to the applicable network.	Absolute -- The MFN applies to all other distributors, even other much larger distributors.
Financial Scope of MFN	Rate Card -- The MFN applied to the rate card and selected launch/promotional support.	Net Effective Rate -- The MFN applies not only to rates but also to all financial transactions between the parties regardless of whether they are part of the distribution agreement. Thus, a distributor may seek to take the benefit of advertising with another distributor to increase ratings, thereby decreasing its net effective rate.
Application of MFN to Other Terms and Conditions	Limited -- MFNs originally were limited to financial terms and conditions and then expanded to specified additional terms and conditions.	Term-by-Term -- The MFN applies separately to each and every term in each distributor's agreement without regard to any other term with some distributors seeking to claim portions of provisions as more favorable terms. This MFN is also referred to as a "cherry picking" MFN.
Conditionality of MFN	Conditional -- A distributor's right to a lower rate or other more favorable term is conditioned upon its willingness to accept the other terms and conditions associated with that rate or term. For example, a programmer will often accept a lower rate for expanded distribution.	Unconditional -- The distributor is entitled to the lower rate or other more favorable term without any obligation to satisfy other related terms and conditions. Alternatively, major distributors eliminate the key conditions such as penetration, level of distribution, or length of commitment from the conditions that they are willing to satisfy.
Enforcement and Penalties	Self Certification -- Programmer periodically certifies compliance with the MFN.	Audit and Penalties -- Distributor may have an MFN audit right and demand potential penalties for MFN non-compliance, such as interest, cost of audit, and multiple of MFN differential as damages.